CHURCHWARD v. CHURCHWARD and HOLLIDAY

(the Queen's Proctor intervening).
Nov. 8, 9 {hearing}, 21 {judgment} 1894.

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before

Sir Francis Henry Jeune,
President of the Probate, Divorce and Admiralty Division.

"Collusion"

A corrected text version with some notes by

E C G

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The object of this work is to supply an easily read report of this judgment in *Churchward v Churchward* from *The Law Reports of the Incorporated Council of Law Reporting [1895],* and add some notes.

Throughout in the text the figure in square brackets [] is the original page number. In footnotes from the book the original number is shown thus: (1).

It is very easy when reading cases and judgments to forget, especially at a large time difference, that those involved were more than cardboard figures. They were like us and had the same virtues and frailties we all have to one degree or another.

So here we have 'the wife', born Florence Evelyn Gilbart in the last months of 1868.[1] She would marry John Steed Churchward in the summer of 1887.[2]

They would bring into the world as daughter, affectionately called 'Poppie' on 27 January 1890.[3]

'The husband' was born early in 1843.[4] At once the age difference of twenty-five years is striking. He variously described himself as 'bankers clerk', 'accountant' and 'clerk to a company'. How he met Florence Evelyn and why on earth at eighteen she went through a form of marriage with him cannot be known. It may have something to do with her father's[5] profession — of — 'accountant'. At any event John Steed Churchward had a long life dying at Wonford House, Exeter, Devon on 13 September 1930[6] aged 87. His probated estate was £931 9s 7d.

Florence Evelyn, as will be seen below, was stated to be in a much better financial position than her husband. As she could not re-marry she retained her married name and lived

1 Births Dec 1868 Gilbart Florence Evelyn G Solihull 6d p465 Christening 8 Nov 1868 Lapworth
2 Marriages Sep 1887 Churchward John Steed to Gilbart Florence Evelyn G Croydon 2a p 413.
3 Births Mar 1890 Churchward Evelyn Gilbart G Croydon 2a p261
4 Births Mar 1843 Churchward John Steed Okehampton 10 p179
5 William Leggatt Gilbart b. 1827 d. 1901
6 Deaths Sep 1930 Churchward John S Age 87 Exeter 5b p102

to 68[7] and left £2,318 6s 5d.

'Poppie' married in Sussex in the summer of 1946, one Thomas Strange Biggs,[8] a widower. There is obviously a story behind this late marriage. Biggs was a 'medical student' in 1891 and later described himself as 'surgeon living on means'. He died at Paingnton, Devon in 1954.[9]

'Poppie' died on 30 April 1979,[10] leaving £3,381.

Which brings us to William John Holliday, the third part of this triangle - about whom absolutely nothing appears to be known.

Short notes on the legal eagles involved will be found in the text. After researching rather more bar practitioners and solicitors than I care to think about, I can see why most died poor or worse. To get a side's representation in a matter like this for £100 sounds like a bargain! Especially when today in the High Court a two day hearing can run to £98,000 — one Q C and one Junior a side.

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7 Deaths Jun 1937 Churchward Florence E G Age 68 Norton 5c p512
8 Marriages Jun 1946 Biggs Thomas S to Churchward Evelyn G G Lewes 2b p485
9 Deaths Mar 1954 Biggs Thomas S Age 90 Totnes 7a p927 Estate £7,641 18s.
10 Deaths Jun 1979 Biggs Evelyn Gilbert G NEWTON A 21 p1554

CHURCHWARD v. CHURCHWARD and HOLLIDAY
(the Queen's Proctor intervening). Nov. 8, 9 {hearing}, 21 {judgment} 1894.

Sir Francis Henry Jeune,[11]

President of the Probate, Divorce and Admiralty Division.

Divorce — Collusion — Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 30 — Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), ss. 5, 7.

If the initiation of a divorce suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld.

The petitioner made an agreement with the respondent, who had committed adultery with the co-respondent, by which she undertook to settle money on the child of the marriage, and he to take proceedings for divorce, which she was not to defend and of which she was to pay the costs, he not claiming damages against the co-respondent. The agreement was disclosed to the Court.

The petitioner did not connive at the adultery, and no false testimony was adduced before the Court in proof of it. It was not shewn that there were any specific facts, material to defence or recrimination, which might have been brought forward by the respondent; but it was not proved that there were no material facts which she might have brought forward by way of defence or recrimination: —

Held, on the intervention of the Queen's Proctor, that the agreement constituted collusion between the petitioner and the respondent, so as to disentitle the petitioner to a divorce.

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11 Jeune, Francis Henry, 1st Baron St Helier
b. 17 Mar 1843 d. 9 Apr 1905. Estate £233,398 8s 10d. Married 17 Aug 1881 Susan Mary Elizabeth Stanley [nee Stewart-Mackenzie] M.A. Balliol Coll., fellow Hertford Coll. Oxon, chancellor of the diocese of Gloucester and Bristol 1885, and of dioceses of St. David's and Bangor, official of archdeaconry of Essex, a member of the South-eastern circuit, a student of the Inner Temple 16 Jan., 1864 (then aged 20), called to the bar 17 Nov 1868. Judge in the Probate, Divorce and Admiralty Division of the High Court and knighted 1891: President P. D. & A. Jun 1892. Privy Council 1892. Judge Advocate General Dec 1892. Resigned Probate, Divorce and Admiralty Division Jan 1905 [ill health]. Raised to the peerage 1905 as Baron St Helier of St Helier in the Island of Jersey and of Arlington Manor in the County of Berkshire.
Eldest son of Rt Rev Francis Jeune, late bishop of Peterborough); Address:Hare Hatch Lodge, Twyford, Berks; Arlington Manor, near Newbury; 37, Wimpole Street, W. - ECG

Intervention of the Queen's Proctor on the ground of alleged collusion between the petitioner and the respondent.

The following statement of the facts is taken from the judgment.

In this case the husband petitioned for a divorce, on the ground of his wife's adultery with the co-respondent. There was no defence, either by the respondent or the co-respondent, and at the hearing the adultery was clearly proved. I therefore granted a decree nisi;[12] but, as the counsel for the petitioner gave me information of an agreement between the petitioner and the respondent, and of correspondence between their solicitors, I thought it right to direct that the papers should be laid before the Queen's Proctor, in order that he might intervene if he should be so advised. He has intervened, alleging: collusion between the petitioner and respondent.

With the exception of some evidence taken at the hearing of the intervention, the whole of the evidence consists of the agreement, of certain correspondence, and of the diary, or notes, of the petitioner's solicitor. I think, therefore, that it must be taken that, substantially, all the materials affording evidence of collusion were disclosed and offered to me at the trial of the petition by the petitioner's counsel.

The material facts are as follows. On June 4, 1893, the respondent left her home, no doubt accompanied, or soon afterwards joined, by the co-respondent. On the 5th she telegraphed to her husband's sister that she had left home for good. On the 6th she wrote a letter to her husband containing the following passages:

> "You are not surprised, I presume, at my leaving you. It had preyed on my mind for some time past, the fact that you did not want me; and that your opinion was that Poppie would be better looked after without me; and that everything I did was wrong. You have so often, over a mere trifle, told me 'to go'; and I have now done so; and I need not remind you of all the cruel things you have said to me since Poppie's birth."

On June 10 she wrote:

> "From your telegram received yesterday" (this telegram was not produced) "you do not seem to realize the position. I would willingly spare your feelings; but it is far better frankly to tell the truth that I have not left home alone. It is a source of trouble to me to think that poor little Poppie is worrying for me; but you should have thought of this before you so many, many times have told me to go. After all that has occurred, it is impossible

12 On 21 March 1894 - ECG

> for me ever to return, or matters to be mended. You had far better proceed with a divorce against me. . . . Had you only been different these last three-and-a-half years (which you admit in your telegram), things would not be as they are."

At that time, or at latest by June 14, the petitioner was aware that the respondent and co-respondent were living together.

It was stated by the petitioner's solicitor, Mr. King, that before [9] June 19, the petitioner informed him, as a friend, of what had happened, and expressed a wish to sue for a divorce. There is no entry of this in Mr. King's notes for his bill of costs, the first entry of which is under the date of June 19. On that day the respondent's solicitors, Messrs. Chester & Co., wrote to the petitioner's solicitors for an appointment that afternoon. In Mr. King's notes the following entry occurs:

> "June 19. — Attending Messrs. Chester, who represented Mrs. Churchward, upon their call discussing this matter very fully with them, and explaining the position of the matter, and that Mr. Churchward was disposed to act in a reasonable way with regard to Mrs. Churchward's clothes and securities, provided he was fairly met, and we were, after conferring with you, to endeavour to make some proposal with a view to a settlement. Afterwards attending you, discussing matter very fully, informing you result of our interview with Messrs. Chester, and the admissions they were prepared to make, and conferring particularly as to taking proceedings in the Divorce Court, which under our advice you declined to do, at any rate for the present, and you requested us to see Messrs. Chester to-morrow and make the best arrangement we could by way of settlement for the benefit of the child."

Mrs. Churchward was possessed of about £2,600 in various investments, and also of a reversion expectant on the death of her father in about £1.600. This property was at her disposal, and could, of course, at any time have been expended or given away by her; and it must have been obvious that she might not improbably either give it to the co-respondent, or, if she could marry him, settle it on herself and him. Under date of June 20, in Mr. King's notes occurs this entry:

> "Attending Messrs. Chester, discussing matters fully, when we stated that you would be prepared to accept a scheme by which the whole of Mrs. Churchward's property should be settled for her exclusive benefit for her life, £2.000 on her death to be held in trust for the benefit of the child, and they promised to see her on the matter. Attending you in the evening, discussing matter very fully with you, and agreeing as to course to be taken, and you gave us certain information which rendered it impracticable for any divorce proceedings to be for the benefit of Mrs. Churchward, [10] and agreeing to

> see Messrs. Chester again to-morrow."

The information referred to in the above note was that Mr. Holliday was already married, which, however, was soon after discovered not to be the ease. Under date of June 21, Mr. King has the following note:

> " Attending Messrs. Chester, giving them particulars of information you had obtained with reference to Mr. Holliday, discussing matter further with them, when they stated that they had seen Mrs. Churchward, and that she was prepared to make some reasonable settlement of her property, which they strongly advised her to do for her own protection."

and under date of the 22nd:

> "Attending Mr. Churchward, discussing this matter very fully with him, when we ultimately agreed the terms to be proposed to Messrs. Chester with a view of settling this matter, and discussing the same fully."

On June 22 the petitioner's solicitors wrote to the respondent's solicitors proposing certain terms. They were, so far as is material, that the £2,600 belonging to his wife was to be settled, she to have a life interest in it, with reversion, as to £500 to the child of the petitioner and respondent, and power of appointment by will over the remainder; that, of the £1,600 in reversion, £1,000 should after the respondent's death, go to the child, if then living, otherwise this reversionary interest to belong to the respondent; and that, if desired, a deed of separation should be executed. At that time the petitioner's solicitors and the petitioner believed the co-respondent to be married. On June 24 the respondent's solicitors wrote:

> " We do not for a moment suppose your proposals will be accepted in their entirety, but we shall advise that a proper settlement be made if you meet us in other ways, and, when we last saw the parties, there was a distinct disposition to accept our advice in that respect."

This was followed by a letter from the respondent's solicitors on the 26th, in which the terms proposed are accepted, with modifications, and the following words follow:

> "The whole of the above suggestions are, however, contingent on this further term — viz., that Mr. Churchward at once commences and uses all due diligence to obtain a divorce, so as to enable Mrs. Churchward to marry Mr. Holliday as early as may be practicable."

Under date of June 27 Mr. King's notes state:

> "Attending [11] Mr. Churchward, discussing the matter with him, but he declined to accede to the proposal, and insisted on some better terms being made for the benefit of the child":

and under date of the 28th:

> "Attending Mr. Griffithes,[13] discussing this matter fully with him, and we informed him that you were not disposed to accept the proposal made, or any other which did not make satisfactory provision for the child, and until such terms were arranged we could not discuss the question of divorce, and we made a counter-proposal . . . and they were to see their client further upon it."

On June 29 the respondent's solicitors wrote to the petitioner's solicitors, modifying the pecuniary proposals, and adding:

> "This is the very best we can do, and we believe, if it be not accepted, we shall have peremptory instructions to at once issue a summons that the property be made over to Mrs. Churchward."

On July 3 it appears from Mr. King's note that Mr. Churchward:

> "declined to take any proceedings until the terms were finally agreed on,"

and on the same day the petitioner's solicitors wrote:

> "With regard to the proceedings" (for a divorce) "our client will be prepared to act on your suggestion after settlement of the above matters, provided he be fully indemnified against all costs by a sum of money to be agreed on being deposited."

On July 4 the respondent's solicitors, after referring to the pecuniary terms of the proposed settlement, wrote:

> "We do not think there is anything else in your letter to which any objection will be taken . . . and we think the matter of costs of suit may be met by a deposit of £50 in joint names, the deed of settlement containing a proviso that, unless within twelve months from its date Mr. Churchward obtains a decree absolute, Mrs. Churchward may at her option avoid the deed. We

13 This is Thomas Penson Griffithes [sometimes 'Griffiths'] born Bishop's Castle, Salop. [Births Jun 1851 Griffithes Thomas Penson Clun 18 p49] and ch. 25 Apr 1851 Bishop's Castle, son of Thomas Jones Griffithes a "Land Agent". Served clerkship with Mr Richard Marston, Ludlow. Partner: Chester, Broome and Griffithes, 36 Bedford Row London [1913]; earlier Chester, Mayhew, Broome, & Griffithes [1886 same address]. He died 2 Jan 1926 aged 74 [Deaths Mar 1926 Griffithes Thomas P Age 74 Marylebone 1a p694]. Estate: £31,915 17s 8d. - ECG

> think this proviso should be inserted, because we feel some fear that if the arrangement came to light, we might have trouble with the Queen's Proctor, and, although we are of opinion that the contemplated arrangement would not enable him successfully to intervene, it is quite possible a jury, at his instance, might take an adverse view."

Some further discussion took place between the petitioner's and respondent's solicitors, but on July 11 the latter sent to the former draft terms of agreement. The terms of this agreement [12] as to the divorce proceedings appear from a letter composed by the petitioner's and respondent's solicitors jointly, and sent to counsel, in consequence of the strong objection of the petitioner's solicitors to any reference to the divorce proceedings. That letter, dated July 17, contained this passage: —

> "We are instructed in a matter between husband and wife, where the latter is now living in adultery, and terms are being arranged as to the wife's property, which at present remains in the physical custody of the husband. In these circumstances we, acting for the wife, have suggested that, in consideration of certain things to be done by the wife, the husband shall covenant at once to sue for a divorce, and prosecute his suit to completion, claiming no damages against the co-respondent, and the wife and co-respondent agreeing not to defend, and the husband agreeing to these terms on condition that the sum of £100 is secured in the joint names of the solicitors in the case, to cover his costs."

Counsel, thereupon, advised: —

> "I am of opinion that the proposed arrangement is, if not actually collusion, liable to the suspicion of collusion, and would, therefore, endanger the husband's decree, and I think his solicitor is very wise in refusing to enter into it. I do not think the terms as to costs so objectionable as the agreement not to defend. The wife and co-respondent may or may not have a good defence; if they have, such an agreement is, of course, *ipso facto*, collusion; and, if they have not, I do not see the necessity for any such agreement, and, if the Queen's Proctor intervened, the husband would have considerable difficulty in inducing the Court to believe that he did not enter into the agreement for the purpose of suppressing facts, which he would prefer were not brought to the knowledge of the Court."

It was admitted by the petitioner's solicitor, in evidence given at the hearing of the intervention, that the terms of agreement stated in the letter to counsel represented the agreement then and now existing between the parties. An endeavour was made by the petitioner's solicitors in a letter, dated July 20, to leave the agreement as to divorce on an understanding; but eventually two agreements were settled and signed by the husband and wife on August 25, one settling the wife's property to some extent for

the benefit of the child, and the other in the following [13] terms, which, it will be seen, do not specifically provide for no defence being made to the suit.

> " Whereas the said J. S. Churchward is entitled to a decree for dissolution of marriage against his wife, the said F. E. G. Churchward, with W. J. Holliday as co-respondent; and whereas in consideration of other terms of arrangement this day signed between the said parties hereto, they have agreed to the further terms hereinafter contained; and whereas the sum of £100, money belonging to the said F. E. G. Churchward, has been deposited in the London and Joint Stock Bank, Chancery-lane branch, in the joint names of Mr. King and Mr. Griffithes, the respective solicitors of Mr. Churchward and Mrs. Churchward, for the purposes hereinafter mentioned; now, it is hereby agreed as follows: —
>
> "1. The said J. S. Churchward shall forthwith institute and prosecute, with all due diligence, a suit for divorce against the said F. E. G. Churchward as respondent and the said W. J. Holliday as co-respondent, without any claim for damages against the said co-respondent.
>
> " 2. The taxed costs of the said J. S. Churchward of such suit, to be paid out of the £100 deposited as aforesaid, upon a decree absolute being made within fifteen calendar months of the date hereof, and subject thereto the said £100 shall belong to the said F. E. G. Churchward."

On August 7 Mr, Churchward wrote to his solicitor in these terms:

> " I think this week is the only chance before the Long Vacation of filing a petition, and I shall feel much more comfortable when it is done .... Please hasten the petition."

At this time the terms of the arrangement were settled, except a question as to the persons to be named as trustees. It would appear, from an entry of October 21, that the petitioner's solicitors felt difficulties as to presenting a petition, but on November 1 this was done.

Inderwick,[14] Q.C., and Guy Stephenson,[15] for the Queen's Proctor. The evidence shews collusion. The decree must be taken to have been obtained by the petitioner and the respondent acting in concert. She agreed with the petitioner to settle money

14 Frederick Andrew Inderwick, Q.C., b. 23 Apr 1836 educated Trin. Coll. Camb., a student of the Inner Temple 16 April, 1855 (then aged 20), called to the bar 26 Jan 1858, Q.C. 19 March, 1874, bencher 5 June, 1877 (4th son of Andrew Inderwick, R.N.) author of Law of Wills Divorces and Matrimonial Causes Act. Married 4 Aug., 1857, Frances Maria Wilkinson. Address Mariteau House, Winchelsea, Rye, Sussex, 8 Warwick Square S.W ; 1, Mitre Court Buildings Temple EC. Died [Scotland] 16 Aug 1904. Estate £37,975 11s 9d. - ECG

15 b. 1862 d. Queen's Gate 17 Oct 1930 Estate £20,270 1s 5d. Sometime Assistant Treasury Solicitor and Assistant Director of Public Prosecutions. - ECG

on the child and to pay the costs of the proceedings, if he would [14] divorce her without claiming damages against the co-respondent, whom she wished to marry. The House of Lords would have held such an agreement to be collusive: see Standing Order 142 (Macqueen's House of Lords' Practice, 528, 791), and Chisim's, Edwards' and George's Cases[16]. The decisions of the full Court in Midgley v. Wood[17] and Lloyd v. Lloyd and Chichester[18] are to the same effect.

Lawson Walton,[19] Q.C. and R. H. Pritchard,[20] for the petitioner. The collusion which the Queen's Proctor has to prove is "collusion for the purpose of obtaining a divorce contrary to the justice of the case" within s. 7 of the Act of 1860. There is no evidence of such collusion. The petitioner was entitled to a divorce from the respondent. This being so, he and she put themselves into the hands of their solicitors. The result was an arrangement by which scandal and expense were avoided, and a settlement for the child secured. Such arrangements are common and useful. In order to constitute collusion, there must be some plot to lay a false case before the Court. This was not the case here, and the arrangement was itself disclosed. The cases in the House of Lords are not binding on the Court. The view that a *bona fide* agreement between an innocent and a guilty person to obtain a divorce is not collusion, is, it is contended, taken by Lord Stowell in Crewe v. Crewe[21], by Dr. Lushington and the Lord Advocate of Scotland in their answers before the Select Committee of the House of Lords in 1844[22], by Lord Chelmsford in Shaw v. Gould[23], and by Lord Hannen in Hunt v. Hunt,[24]

Inderwick Q.C., in reply.

Cur. adv. vult,

The President (after stating the facts as above) continued as follows: —

From the evidence before me I draw the following conclusions: —
[15]

16 (1) Macqueen's House of Lords' Practice, 582, 583, 661.
17 (2) 30 L. J. (P. M. & A.) 57.
18 (3) 30 L. J. (P. M. & A.) 97.
19 John Lawson Walton, born 4 Aug 1852; married 21 Aug 1882, Joanna M'Neilage. Matric. London Univ. 1872, a student of the Inner Temple 2 Nov 1874 (then aged 22) (first prize common law 1876), called to the bar 13 June, 1877 (eldest son of Rev. John Walton M.A., of Grahamstown, South Africa). - ECG
20 Robert Henry Pritchard, b.1859 d. 5 Jan 1918, Hampstead. Estate £1,120 18s 7d B.A.Univ, Coll,, Oxon, 1882, a student of the Inner Temple 15 Jan 1880 (then aged 21), called to the bar 17 Nov 1884 (eldest son of Robert Albion Pritchard, of the Middle Temple); Address: 6, Hotham Villas, Putney, S.W. - ECG
21 (4) 3 Hagg. 123, at p. 129.
22 (5) See the First Report of the "Commissioners appointed to Inquire into the Present State of the Law of Divorce," published in 1853 by Messrs. Bradbury & Evans, pp. 35, 59.
23 (6) Law Rep. 3 H.L.55,at pp.77,78.
24 (7) 47 L. J. (Prob.) 22.

1. That the respondent and co-respondent were guilty 1894 of adultery.

2. That the petitioner did not connive at such adultery.

3. That there was no collusion to present to the Court false facts in proof of adultery.

4. That the petition was presented in accordance with, and in consequence of, the agreement come to between the parties. By this I mean that the petitioner would have been content with a separation, could he so have obtained the pecuniary settlement he sought; and he would not have presented the petition, if he could not have secured himself against the risk of his wife's property being diverted from his child. It was strongly urged on me, that the petitioner would in any case have presented a petition for a divorce; and that the unwillingness exhibited to the respondent's solicitor was a justifiable stratagem to secure a favourable settlement; and the letter of August 7 was relied on in support of the contention. I cannot accept this view.

5. That it was in fact part of the agreement that the wife and co-respondent should not defend the suit.

6. That it was not shewn that there were any specific facts, material to defence or recrimination, which might have been brought forward by the wife. But it appears to me impossible to say, especially having regard to the wife's letters of June 6 and 10, that it was proved that there were no material facts, which she could have brought forward, by way of defence or recrimination. The petitioner, the petitioner's solicitors, and the respondent's solicitors denied that they knew of any such facts; but such statements cannot, I think, be taken to be conclusive on the point.

The question is whether, under these circumstances, the claim of the petitioner for a divorce should be dismissed, by reason of his collusion with the respondent.

It was contended by Mr. Lawson Walton, in his very able argument for the petitioner, that the collusion necessary to be shewn was that described in the latter part of s. 7 of the Act of 1860, as

> "collusion for the purpose of obtaining a divorce contrary to the justice of the case,"

and he drew a distinction between such collusion and that referred to in s. 30 of the Act of [16] 1857. It is, however, to be observed that the intervention of the Queen's Proctor is not under the latter, but under the earlier part where the phrase is simply "collusion." But the point is not very material, because, as an alternative, Mr. Walton

urged — and this was indeed the real gist of his argument — that collusion meant, in both cases, collusion for the purpose of obtaining a divorce contrary to the justice of the case, in a sense presently to be mentioned, which he ascribed to the words.

Whatever the meaning of collusion, I cannot doubt that it bears the same meaning in s. 30 of the Act of 1857, and in both parts of s. 7 of the Act of 1860. It seems to me impossible to suppose that a totally different sense is to be assigned to the collusion which vitiates a claim for divorce, if discovered by the judge at the trial, before a decree *nisi* is pronounced, and that brought to his knowledge by the Queen's Proctor before or after such decree.

The contest raised in this case as to the meaning of collusion proceeds on clear lines. On the one hand, it was urged that collusion is agreement either, on the positive side, to put forward true facts in support of a false case, or false facts in support of a true case; or, on the negative side, to suppress facts which would prevent, or tend to prevent, the Court granting a divorce. It was insisted that, in a suit against a wife, unless it be shewn that the petitioner's charge of adultery was in fact unfounded, or was supported by false evidence, or that material facts in support of defence or recrimination were concealed, there can be no collusion. On the other hand, it was maintained that collusion has a wider scope, and that if there be an agreement to prosecute a suit which induces the petitioner to prosecute it, and, *a fortiori*, if such agreement contains terms providing for the petitioner's costs, and providing that the case shall not be defended and damages not asked, that is collusion, even though it be not shewn that adultery was not in fact committed, or any false facts put forward to prove it, and though no specific facts adverse to the success of the claim for divorce are shewn to have been concealed. There would seem, therefore, to be four questions that may be asked.

First, is it collusion to procure the initiation and prosecution of a suit, and arrange the mode and terms [17] of its conduct, by agreement, though there be no express stipulation that there shall be no defence, and no specific ground for suspicion that a false case is put forward or material facts concealed?

Secondly, does the addition of a term that there shall be no defence render such an agreement collusion?

Thirdly, is it collusion when, besides such an agreement, there is ground for suspicion that material facts may be concealed?

Or, fourthly, is there collusion only when it is shewn that, in consequence of such an agreement, false matter has been introduced into the case or material facts

suppressed?

In support of the more limited view of the nature of collusion reliance was placed on definitions which, at various times, and with more or less authority, have been given of collusion.

Mr. Macqueen in his book on Divorce (2nd edition, p. 67), summarizes the matter thus:

> "According to the authorities there appear to be two kinds of collusion.
>
> First, where the parties put forward false facts to form the basis of the judgment.
>
> Secondly, where the parties put forward facts which are true, but which have been corruptly and fraudulently preconcerted, to form the basis of the judgment."

This definition is, however, obviously incomplete in omitting the suppression of material facts of defence or recrimination as one kind of collusion; and it therefore shuts out the further consideration which arises, if it be admitted that such suppression does constitute collusion, namely, whether it must be shewn that material facts were in fact concealed. It is remarkable that the learned author goes on to mention Chisim's Case[25] in the House of Lords, without apparently noticing, as I shall presently remark, what an extension to collusion this case appears to afford.

In Creice v. Creive[26] Lord Stowell said:

> "Collusion may exist without connivance, but connivance is (generally) collusion for a particular purpose. Collusion, as applied to this subject, is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury. Real injury there is none, where there is a common agreement between the parties to effect [18] their object by fraud in a court of justice. If such conduct were permissible, it would authorize parties to violate their marriage vow, and would encourage profligate and dissolute manners.
>
> The law, therefore, requires that there should be no co-operation for such a purpose, and does not grant a remedy where the adultery is committed with any such view. It is a fraud difficult to prove, since the agreement may be known to no one but the two parties in the cause, who alone may be concerned in it; for the adulterer may be ignorant of the understanding.

25 (1) Macqueen on Divorce, 2nd ed.. p. 76; Macqueen's House of Lords' Practice, 583
26 (2) 3 Hagg. 123, at p. 129.

> However, it is no decisive proof of collusion that, after the adultery has been committed, both parties desire a separation; it would be hard that the husband should not be released, because the offending wife equally wishes it; she may have honest or dishonest reasons, innocent or profligate; an aversion to live with the man she has injured, a desire to live uncontrolled, or to fly into the arms of the adulterer; it would be unjust that the husband should depend upon her inclinations for his release; he has a right to it. It has been often said, and with peculiar injustice, that, although the original adultery was not collusive, yet the proceedings in these courts lead ultimately to collusion in the conduct of the cause; because, as the suit is between the suffering and the offending party, the latter frequently prays a sentence which she does not wish to obtain. On a little consideration, however, it will be seen that this arises from a wise provision of law: the Canon[27] directs that a divorce shall not go upon the mere confession of the party; the wife, therefore, must give a negative issue (indeed, the Court is almost bound to reject an affirmative issue, since it is necessary, by the Canon, [19] that evidence should be produced); she must deny her guilt, and her prayer must be according to her denial; but this is mere style and form. If the Court sees a fair case made out, what may be the inclination of the wife, be it corrupt or honest, is of little importance; the question is, whether the husband has received a real injury, and *bona fide* seeks relief."

I think that in this passage Lord Stowell was considering, as indeed he says, only the view of the matter applicable to the case before him. It is, no doubt, collusion, where there is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury.

But here, again, there is omitted, because in this case not relevant, the kind of collusion which results from suppression. It is to be observed, however, how carefully Lord Stowell limits the case in which he excludes collusion, to that of a mere desire of both parties to obtain a separation, and does not deal with the results of such a common desire leading to an agreement relative to the suit, still less with those of the desire on the part of the husband being induced by extraneous considerations offered by the wife; and it is to be observed, further, that Lord Stowell insists that the husband must have received a real injury and be seeking relief *bona fide*. This leaves open the question, in what cases is relief sought *bona fide*?

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27 (1) i.e., the 105th Canon, which is as follows: "Forasmuch as Matrimonial Causes have been always reckoned and reputed among the weightiest, and therefore require the greater caution when they come to he handled and debated in Judgment, especially in causes wherein matrimony, having been in the Church duly solemnized, is required upon any suggestion or pretext whatever to be Dissolved or Annulled: We do strictly Charge and Injoin, that in all proceedings to Divorce and Nullities of Matrimony, good Circumspection and Advice be used, and that the Truth may (as far as possible) be sifted out by the Deposition of Witnesses, and other lawful Proofs and Evictions, and that Credit be not given to the sole Confession of the Parties themselves, howsoever taken upon Oath, either within or without the Court." See Burns' Ecclesiastical Law, 9th ed. Appendix II. p, 660.

Great reliance was placed by Mr. Lawson Walton on the definitions of collusion given by Dr. Lushington and the Lord Advocate of Scotland before the Select Committee of the House of Lords in 1844, which are appended to the Report of the Royal Commission appointed in 1850.[28] I therefore refer to them, though they are extra-judicial opinions. Dr. Lushington said (Report, pp. 47, 48):

> "190. A question was put to me as to collusion. Now I beg leave to observe that, in the sense in which it is used in Doctors' Commons, it does not mean even consent or facility, where there is just cause for the husband prosecuting the suit, or vice versa, but it is permitting a false case to be substantiated, or keeping back a just defence. It may be a question whether this rule of collusion extends to cases where recrimination, though practicable, is not resorted to.
>
> 191. Do you mean, by saying where recrimination is not resorted to, that the collusion consists in the abstaining from recrimination ? — Yes; but I do not say that so doing has been deemed to be collusion in the legal sense of the word. . . .
>
> 194. Then do you understand that wherever there is a case where the fact of adultery, cruelty, and so forth, exists, provided that fact is not got up for the purpose of the proceeding, it would not be a case of collusion, though the parties were in collusion as to the proceeding in Court? — Certainly, we should not call it collusion; on the contrary, the expressions which have fallen from the learned judges have been these, and I think they are founded in truth: 'Why, if the wife has already committed the greatest possible offence against the husband by violating his bed, why should she add to it by increasing the expense of the remedy?'
>
> 195. Are you not aware that, to a certain degree, the same principle holds with Divorce Bills, for that, if the wife does not make any defence, which is the case in a great majority of those bills, it is reckoned no proof of collusion? — Certainly.
>
> 196. And so if the paramour makes no defence to the action, and lets judgment go by default, it is no proof of collusion? — Certainly."

It is, I think, obvious that Dr. Lushington chiefly desired to insist that the mere abstention from defence did not constitute collusion; and that the case was not presented to his mind of an agreement between the parties providing for the bringing of a suit and for the terms on which it was to be conducted, including a stipulation that there should be no defence, and of the inference to be drawn from such an

28 (1) See the First Report of the "Commissioners appointed to Inquire into the Present State of the Law of Divorce," published in 1853 by Messrs. Bradbury & Evans.

agreement.

The following questions were put to the Lord Advocate of Scotland, and the following answers given by him (Report, p. 63);

> " 93. Would it be collusion, if the party had actually committed adultery without any collusion, and if then the other party and the adulterous party were colluding together to get a divorce? — That is, I believe, an interpretation pretty generally put upon it. My own impression is that such is not the true meaning of collusion. I mean that if a just cause for a divorce exists without [21] collusion, and the party wronged seeks to have the remedy of divorce, and is entitled to it, I doubt if the circumstance that the other party has no objection, or is well pleased, would be such collusion as to preclude the remedy.
>
> 94. So that if adultery had really been committed, not for the purpose of getting a divorce, but independently of that, it would be no collusion such as to bar the remedy, if the parties entered into a sort of plan for getting a divorce grounded upon that adultery? — I think that, according to the original meaning of collusion, it would not be so; but if you were to examine them very strictly as to whether they had any collusion in bringing the suit, what would be the effect of the parties admitting that they knew of the suit being intended to be brought, and that they had no objection to it, but that, on the contrary, they had allowed the writ to be served, and dispensed with the time, and afforded other facilities, I cannot say."

It is clear that the Lord Advocate expressly abstained from pronouncing an opinion on circumstances in some respects similar to those in the present case. It should, however, be added that a little later he expressed the view that the mere circumstance of people going to Scotland to be divorced, as they might go to be married, would not constitute collusion.[29] It is not necessary to say more on that point than that the mere agreement to do what is necessary to give jurisdiction falls far short of the agreement in this case.

Mr. Lawson Walton further relied on the expressions used by Lord Chelmsford in the case of Shaw v. Gould[30], which are, no doubt, of great weight, though they were not necessary for the decision of the case. The facts, as well as his Lordship's view, can be gathered from his words. They are as follows:

> "But whatever opinion may be ultimately entertained as to the extent of the power of the Scotch Courts to dissolve English marriages, the validity of the

29 (1) Answer 99, p. 63.

30 (2) Law Rep. 3 H. L. 55, at pp. 77, 78.

> divorce of the appellants' mother from Buxton cannot be admitted, if it was obtained by concert or collusion.
>
> It was argued for the appellants that the only collusion which can affect the validity of a divorce is, where there are concert and connivance in the acts upon which the decree proceeds; and that, if a just cause of divorce exists without collusion, any [22] arrangement to bring the facts before a court of competent jurisdiction, however purchased or obtained, is unobjectionable.
>
> I quite agree that if the agreement in this case had been that Buxton should bring himself within reach of the Scotch Court, so as to enable his wife to institute a suit for a divorce, to be determined upon the merits, although it was stipulated that he was to receive a sum of money when the divorce was obtained, this would not amount to collusion. But the arrangement between the parties was of a different character. In order to make it possible for the contemplated marriage between the father and mother of the appellants to take place, the previous dissolution of the marriage with Buxton was absolutely necessary. Shaw, therefore, who was intent upon attaining his object, stipulated that Buxton should be paid a sum of money in case he was divorced, and restrained him from attempting to defeat the proceedings by imposing upon him the forfeiture of the money in case he should "by himself, or by any one through him, give information which should be prejudicial to the divorce."
>
> Such an agreement as this appears to me to come within the very words of the *oath de calumnia*, which was required to be taken by Mrs. Buxton, by which she swore
>
> "that there had been no concert or collusion between her and the defender, or her friends or agents, in raising the action in order to obtain a divorce against him; nor did she know, believe, or suspect that there had been any concert or agreement between any other person on her behalf, and the said defender or any other person on his behalf, with the view or for the purpose of obtaining such divorce."
>
> It is impossible to doubt that the disclosure to the Court of the agreement between the parties upon which the action was raised might have been prejudicial to the divorce, and Buxton would have run the risk of forfeiting the money he was to receive if he had given information about it."

It would appear, therefore, to have been Lord Chelmsford's opinion first, that the agreement by a respondent to come within Scotch jurisdiction for the purpose of a divorce being obtained against him, although accompanied by a stipulation that he should receive a certain sum when the divorce was obtained, did not constitute collusion; and secondly, that the addition of a term [23] that he should forfeit the

money if he gave information prejudicial to the divorce did amount to collusion, because the disclosure to the Court of the agreement might have been prejudicial to the divorce. Lord Westbury also (at p. 87) was of opinion that the decree was collusively obtained, but did not state on what grounds that opinion was based. An agreement to come within the jurisdiction in order that the suit might be brought would, no doubt, not constitute collusion. I venture, with all respect, to think that an agreement that the respondent should be paid if the suit succeeded was at least open to considerable doubt; and this must, it appears to me, have, in truth, been Lord Chelmsford's view, because he thought it collusion to agree, in effect, to conceal those stipulations, as their disclosure might be prejudicial to the divorce. But is not the agreement in this case substantially of the same character as that which Lords Chelmsford and Westbury condemned? Is not an agreement not to defend tantamount in effect to an agreement not to disclose anything prejudicial to the divorce? Although the present petitioner prudently and properly revealed his agreement with the respondent, it is clear that the respondent placed it, by agreement, out of her power to make such a disclosure, and, if so, that agreement became, like the agreement in Shaw v. Gould[31], collusion.

It was pressed strongly on me that in the case of Hunt v Hunt[32] Lord Hannen lent the weight of his authority to the narrower view of collusion. In that case it was alleged that the petitioner had been guilty of conduct conducing to his wife's adultery, and that he induced her to refrain from defending the suit by promising not to press for costs against the co-respondent. It would appear that the jury thought that these allegations were well founded. If so, there was, beyond question, a collusive agreement to conceal facts not only material but conclusive. No doubt, however, the President is reported to have said, in summing up to the jury:

> "Now, collusion is this — if a party to a suit of this kind, by agreement with the other, procures the withdrawal from the notice of the Court of facts which are relevant [24] to the charge which is imputed to him or her, that is collusion."

And he later asked the jury[33]:

> "Were there facts that were pertinent and material, and such as ought properly to have been submitted to the Court or a jury, in order to enable them to determine one or other of the charges against the petitioner? Of course, that will depend on the answer you give to the first two questions I have put to you — namely, Was his conduct such as conduced to his wife's adultery? Did he habitually use foul and indecent language to her?"

31 (1) Law Rep. 3 H. L. 55.
32 (2) 47 L. J. (Prob.) 22.
33 (1) 47 L. J. (Prob.) 23.

It should, I think, be added that, in suggesting the cases in which there would or would not be collusion, the President appears to have put as the test, whether the husband did or did not feel that the matters, for the concealment of which he stipulated, were relevant to the charge made against him. It would, no doubt, appear from portions of his summing-up, that Lord Hannen seemed to regard proof that decisive facts were concealed by agreement as necessary to make out collusion. But it is clear that Lord Hannen did not intend to insist on such facts being decisive, if they were material, because it would appear, from the case of Bacon v. Bacon and Ashby[34], decided shortly before Hunt v. Hunt[35], that he considered that agreement between the parties to withhold relevant evidence was one form of collusion; and also that the evidence need be relevant only and not decisive. The latter point is now established by the decision of the Court of Appeal in Butler v. Butler[36], which I recently followed in Rogers v. Rogers.[37] It must be remembered, also, that in a summing-up it is not necessary, or, indeed, desirable, to do more than state as much law as covers the case in hand; and I think that the view of Lord Hannen, expressed in his summing-up, ought not to be put higher than this, that, where the main evidence of collusion is an agreement not to defend, in order to find collusion you must see that it was intended to conceal material facts.

Giving, therefore, its full weight to the case of Hunt v. Hunt[38], it does not appear to me to conclude a case such as [25] the present, where, though there is an agreement not to defend, there is so much more.

It is now necessary to consider the authorities relied on by the Queen's Proctor. They begin with decisions of the House of Lords before the Act of 1857. It was contended before me that these decisions were not binding in this Court. I am, however, clearly of opinion that they are authorities of the greatest weight. In Shaw v. Gould[39] Lord Westbury said:

> " In England, since the Reformation, marriage, being no longer a sacrament, has always, in theory of law, been dissoluble for adultery in the wife, and for incestuous adultery and other crimes by the husband; but, until the recent Divorce Act, this law was administered by Parliament alone, and though the decision of Parliament was in the form of an Act, or *privilegium*, and not of a judicial decree, yet the Act was granted upon evidence proving that the case came within the scope of certain established rules. This proceeding was in

34 (2) 25 W. R. 560.
35 (3) 47 L. J. (Prob.) 22.
36 (4) 15 P. D. 66.
37 (5) [1894] P. 161
38 (3) See f/n 35
39 (1) Law Rep. 3 H. L. 55, at p. 84.

> spirit a judicial, though in form a legislative, act. The justice of divorce was recognised, but no forensic tribunal was entrusted with the power of applying the remedy. But the law and practice of Parliament were well known; and, in fact, this House acted as a Court of Justice."

It may be added that those decisions of the House of Lords have been repeatedly recognised as authorities, and notably so, in a case I shall presently mention, by this Court. By its Standing Order of March 28, 1798, No. 142 (Macqueen's Practice of the House of Lords, pp. 528, 791) the House of Lords imposed on itself the duty of inquiring

> " whether there has or has not been any collusion, directly or indirectly, on the part of the petitioner relative to any act of adultery that may have been committed by his wife, or whether there be any collusion, directly or indirectly, between him and his wife, or any other person or persons, touching the said bill of divorce, or touching any proceedings or sentences of divorce had in the Ecclesiastical Court at his suit, or touching any action at law which may have been brought by such petitioner against any person for criminal conversation with the petitioner's wife."

There can, I think, be no doubt that the provisions as to collusion in the Act of 1857 [26] were intended to continue the practice of the House of Lords in divorce cases. It is therefore all-important to see what the House of Lords considered collusion to be.

Chisims Case[40] it appeared that the costs of the plaintiff in the action of crim. con. were paid by the respondent's father, and also that in the Ecclesiastical Court no witnesses were called for the wife. The report states,

> "The adultery was clearly proved; but the appearances of collusion were too gross and palpable to admit of being overlooked or explained."

Now, it cannot possibly be said that in this case it was shewn that any specific material facts were concealed; and it is expressly stated that the adultery was proved. It seems to me, therefore, that no conclusion is possible except that the House of Lords considered collusion to be made out from the fact that the parties in the conduct of the proceedings were acting in concert. No doubt the inference was that where such concert existed it was impossible to be sure that all the truth was presented; but the point is that proof of concert in the conduct of the proceedings was held sufficient to engender such a doubt.

In Edwards' Case[41] the report states:

40 (1) Macqueen's House of Lords' Practice, 582.
41 (2) Macqueen's House of Lords' Practice, 583.

> "The evidence of adultery in this case was clear; but a bond signed by the petitioner, Thomas Edwards, was produced, dated December 10, 1778, securing payment of £45 a year to his wife, Judith Edwards, who, on the other hand, "conditioned on her part, that she and all those who were or might become concerned for her in her defence to the said Thomas Edwards obtaining a divorce, would not give any unnecessary delay in the proceeding thereof, but in all things conform herself, and themselves, so as to bring the suit and proceedings to as speedy an issue as possible; yet, nevertheless, not so as to weaken any real defence that the said Judith might be able to make to the said proceedings, or the said Thomas Edwards obtaining his said divorce."

The bill, after counsel had been heard as to the effect of this document, was rejected, and it was so treated, therefore, merely on proof that the parties had agreed there should be no defence, and this single fact was considered to establish collusion.
[27]
In George's Case[42] there were circumstances connected with a prior separation between the parties as to which the House was clearly not satisfied; but, besides this, great stress was laid on the fact that there had been a contract between the parties with respect to the verdict in the Ecclesiastical Court, and this seems to me to shew that, in the judgment of the House, that fact went far, if not the whole way, to establish collusion.

I now turn to the decisions of this Court. In the case of Midgley v. Wood[43]), which was a, case of nullity. Sir Cresswell Cresswell expressed his opinion that, in a suit for dissolution by reason of adultery, it would be collusion if the parties were to concur in getting up evidence of the case, though the case were a true one. The learned Judge Ordinary suggested that there might be a distinction in this respect in the case of a suit for nullity, where both parties might institute the suit, on the same grounds; and this appears to me to shew that the view of Sir Cresswell Cresswell was that collusion existed where one party, contrary to his or her apparent interest, was found acting in concert with the other in matters material to the suit.

The case of Lloyd v. Lloyd and Chichester[44], decided by the full Court, consisting of the Judge Ordinary, Wightman, J., and Byles, J., presents facts bearing very close resemblance to those in the present case. The adultery of the respondent, who had left her husband and was living with the co-respondent, was unquestionable. The Court stated that they did not find that the husband connived at or was accessory to the adultery; nor was any matrimonial misconduct imputed to him. But it was discovered

42 (1) Macqueen's House of Lords' Practice, 661.
43 (2) 30 L. J. (P. M. & A.) 57.
44 (3) 30 L. J. (P. M. & A.) 97.

by the Court that the petitioner had received money from the wife's father to induce him to proceed with the suit, there being ground to think that he fancied that a dissolution of the marriage would cause him to lose a reversionary interest under a settlement; that his costs in the suit were provided by the wife's father; that neither costs nor damages were to be demanded against the co-respondent; and that the wife's father and the co-respondent assisted in getting up the evidence, the former giving facilities for obtaining evidence by allowing his servants [28] to say what they knew, the latter giving money for this purpose to an agent sent by the husband to Paris, where the respondent and co-respondent were residing. The Court, referring to Chisims Case[45], held that the appearance of collusion in the case was too gross and palpable for any Court to overlook it. The material elements in that case, of the petitioner receiving consideration to prosecute the suit, and having his costs secured, are present in this. It is true that, in that case, the parties acted together to get up the evidence, whereas in this case that was not done, because it was unnecessary. But what is material is that, no more in that case than in this, was it suggested that there were any false facts put forward or any material facts concealed. The utmost that can be said is that the Court had before it parties not independent, but acting throughout in concert; and the principle to be gathered from that case appears to be that, under such circumstances, the Court is forced to believe that it is being misled, or, at any rate, that it can feel no assurance that it is not.

In the face of these two cases I think it impossible to say that in Jessop v. Jessop[46], decided shortly after them, in 1861, Sir Cresswell Cresswell intended to limit collusion to cases in which the agreement was to keep back evidence of a good answer, or to set up a false case; nor do I think his words as to the particulars required, in his summing-up to the jury, bear such a meaning. In Gethin v. Gethin[47], decided later in 1861, I am inclined to think that Sir Cresswell Cresswell intended to express an opinion that, if it were shewn that a husband, who was respondent, withdrew charges against his wife and made no defence, not acting independently but in pursuance of an agreement, that would constitute collusion. It is true, however, that in that case there was ground for suggesting that the wife had been guilty of adultery, though the jury found she had not; but it cannot be said that there was any concealment of the case as to adultery, because, in fact, the husband had previously filed and abandoned a petition. I am not sure, however, that this case leads [29] to any clear conclusion. Nor do I attach much importance to the 1894 case of Harris v. Harris and Lambert[48], in which it appeared that the respondent had assisted the petitioner's case by facilitating proof of identification, and Sir Cresswell Cresswell said: —

45 (1) Macqueen's House of Lords' Practice, 582.
46 (2) 9 W. R. 640; 30 L. J. (Prob) 193.
47 (3) 31 L. J. (P. M. & A.) 43.
48 (1) 31 L. J. (P. M. & A.) 160.

> "Such communications are always dangerous, and cannot fail to excite some suspicion of collusion. I took time to examine the evidence, and I see no reason to believe that the parties were acting in collusion."

I will only say that I do not think that this case in any way militates against the view more fully expressed by that learned judge in other cases I have mentioned. Probably the learned judge thought that the concert between the parties did not amount to collusion, because it did not involve matter sufficiently material to the issue of the suit.

The case of Barnes v. Barnes and Grimwade[49], decided in 1867 by Lord Penzance, is not so strong an authority as Lloyd v. Lloyd and Chichester[50], because in Barnes v. Barnes and Grimwade[51] the husband induced the wife, for a consideration, not to oppose; but there were, no doubt, some facts brought to light which, if disclosed to the Court, might have induced it to refuse the decree. Still, the words of Lord Penzance appear to me to indicate that his view of collusion did not differ from that of Sir Cresswell Cresswell. His Lordship said: —

> "I am of opinion that, although the petitioner was reckless in his conduct, and careless whether his wife committed adultery or not, the evidence does not go so far as to establish actual connivance. But he certainly exposed his wife to temptation, to which no wife ought to be exposed by her husband, and was guilty of neglect and misconduct conducing to the adultery. With regard to collusion, I agree with the learned counsel that the mere fact of his having given her money, both before and after the institution of the suit, does not prove collusion. I see no impropriety in a husband making his wife a reasonable allowance while a suit is pending, in order to save the expense of an application to the Court for alimony. If that evidence stood alone I should hold that it was not sufficient to prove the charge of collusion; but the evidence goes much further. It amounts in substance to this — that the petitioner said to the respondent, 'If you do not oppose I shall get a divorce cheaper than if you do; therefore keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the co-respondent.'
>
> If that is not collusion, I do not know what is. It is said that she had no defence to offer, and it certainly seems that she had not as far as her own adultery is concerned. But if she had brought to the knowledge of the Court the facts which have now been proved as to the petitioner's conduct in exposing her to temptation, it would have been a grave question whether

49 (2) Law Rep. 1 P. & D. 505.
50 (3) 3D L. J. (P. M. & A.) 97.
51 See f/n 49

> the Court would have granted a decree. For these reasons I think that the Queen's Proctor has proved the allegation that material facts have been suppressed. I think that the charge of collusion is also established."

I have quoted the whole of the learned judge's judgment, because, taken as a whole, it seems to me to shew that from the agreement not to defend alone he would have inferred collusion.

On the whole, it appears to me that the authority of the House of Lords, as shewn by its practice, and of Sir Cresswell Cresswell, as well as of Byles and Wightman, JJ., is decidedly in favour of the position that, if the initiation of a suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion, although no one can put his finger on any fact falsely dealt with, or withheld; and I do not think that the authority of Lord Stowell, Dr. Lushington, Lord Penzance, or, though no doubt this is less clear, of Lord Hannen, can be invoked in favour of a contrary opinion.

It must always be remembered that, on grounds of public policy, second, perhaps, to none in importance, the marriage status cannot, however much the parties to it may otherwise desire, be altered, except on the fulfilment of certain conditions prescribed by law, conditions which relate to the conduct not only of the person against whom, but of the person by whom, relief is sought. Hence, it arises that in matrimonial proceedings, this Court has imposed on it, by the previous practice, and by the provisions of the Act of 1857, the peculiar duty of ascertaining for itself, so far as it can, whether in any case there exist bars, absolute or discretionary, to the petitioner's claim.
[31]
I am not, therefore, prepared to say that the reason underlying what I think is the effect of the decisions of the House of Lords, and of the Acts of 1857 and 1860, may not be that, when the parties to a suit are acting in complete concert, the Court is judgment deprived of the security for eliciting the whole truth, afforded by the contest of opposing interests, and is rendered unable to pronounce a decree of dissolution of marriage with sufficient confidence in its justice. If this be so, the expression in s. 7 of the Act of 1860,

> "collusion for obtaining a divorce contrary to the justice of the case,"

may be understood to indicate that, by such an agreement, justice is imperilled, but not to require that it must be affirmatively shewn that, having regard only to the matrimonial conduct of the parties, justice will not be, or has not been, done. No doubt the protection to the Court, afforded by the mutual watchfulness of hostile parties, often does not exist, because the petitioner and the respondent may,

independently of each other, be of the same mind. Against results of that unanimity no legislation can guard. But it may well be worth-while to prevent the parties to a suit from binding themselves by an agreement which, if there be anything to hide, renders it obligatory on both of them to keep the veil drawn. At least, if a petitioner makes the institution of his suit and its proceedings a matter of bargain, stifling defence and recrimination by a covenant of silence, he cannot wonder if the Court declines to be satisfied that it has before it all the material facts. Such a petitioner has mistaken his position. *Pacem duello miscuit.* He appears before the Court in the character of an injured husband asking relief from an intolerable wrong; but if, at the same time, he is acting in concert with the authors of the wrong, and is subjecting his rights to pecuniary stipulations, he raises more than a doubt whether, in the words of Lord Stawell, "he has received a real injury and *bona fide* seeks relief."

In the present case, being of opinion, as I have said, that the initiation of the suit was procured and its results as to costs and damages settled by agreement, I think it must be held that there was collusion. If it be necessary to constitute collusion that there should be a compact not to defend, that also was present in this instance. Further, if it be needful that suspicion [32] of the concealment of some facts be entertained, I entertain (I do not wish to say more) as to the facts of the husband's conduct from the expressions used by the wife in her letters. But I do not think it has been shewn, nor in my opinion need it, that any specific facts of a material character exist which might have been brought before the Court.

I was much pressed by counsel with the hardship on the petitioner of dismissing his petition and of rendering the agreement of no effect. But I cannot assent to this view. As regards freedom from an adulterous wife, if the petitioner desires that, for its own sake, I see nothing to prevent his filing a petition without agreement with her. As regards the obtaining pecuniary advantage, for himself or his child, I must say that a divorce suit ought not, in my judgment, to be made the stipulated price of any pecuniary consideration.

The intervention of the Queen's Proctor must, therefore, succeed; but there will be no order as to costs. I was pressed to say that the disclosure of the agreement at the trial negatived collusion. I cannot follow that suggestion, because confession is not a defence. But I think that the conduct of the petitioner, in making this disclosure, entitles him to favourable consideration as to costs.

Solicitors: Solicitor to the Treasury; King, Wigg & Co.

H. D. W.

[33]

Evening Express [Wales] 10 Nov 1894

ACCOUNTANT'S DIVORCE.

Wife Said to Have Eloped with Co respondent.

In the Divorce Division on Friday the President. further heard the case of Churchward v. Churchward and Holliday. The petitioner, Mr. John Stead Churchward, accountant, had obtained a *decree nisi*, and the Queen's Proctor now intervened to prevent the decree being made absolute, alleging that an agreement had been entered into whereby the wife, out of her separate estate, was to provide for the maintenance of the child of the marriage, and that the petitioner should sue for divorce, making Mr. William Holliday a co-respondent, but preferring no claim for damages against him. Respondent, it was said, had eloped with co-respondent, and petitioner, therefore, had a legitimate claim for a divorce. The Queen's Proctor, however, contended that his right to relief was destroyed by the agreement, which constituted collusion. Counsel for petitioner, on the other hand, contended that there was no deception practised on the court, and a just cause for divorce existed. His Lordship reserved his decision.

Evening Express [Wales] 21 Nov 1894

A DECREE RESCINDED.

Queen's Proctor Intervenes in a Divorce Suit and Proves Collusion.

In the Divorce Division all Wednesday the president gave his decision in the case of Churchward v. Churchward. This was a case in which Mr. John S. Churchward, an accountant. had obtained a decree *nisi* for the dissolution of his marriage, and the Queen's Proctor intervened, alleging that there had been collusion because the parties had come to an agreement whereby the wife, out of her separate estate, should provide for the maintenance of the child of the marriage, in consideration of' the husband prosecuting his suit for a divorce. It was contended that there had been no collusion, as the facts were not concealed from the court, and petitioner had a

legitimate claim for divorce, and there was no attempt to deceive the court. Sir Francis came to the conclusion that, as the initiation of the suit was procured, and its result as to costs and damages settled by agreement, that must be held to be collusion. The Queen's Proctor, therefore, succeeded. and the decree *nisi* would be rescinded. There was no order as to costs.